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No.99-699

IN THE
SUPREME COURT OF THE UNITED STATES

BOY SCOUTS OF AMERICA AND MONMOUTH COUNCIL OF BOY SCOUTS OF AMERICA, *Petitioners*,

v.

JAMES DALE, *Respondent*.

On Petition For A Writ of Certiorari to the Supreme Court of New Jersey

BRIEF *AMICI CURIAE* OF THE AMERICAN CENTER FOR LAW AND JUSTICE AND THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION SUPPORTING PETITIONERS

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INTEREST OF AMICI*

The Ethics & Religious Liberty Commission of the Southern Baptist Convention is the ethics, moral concerns, public policy and religious liberty agency of the Southern Baptist Convention, the nation's largest Protestant denomination with nearly sixteen million members in 40,000 local congregations. The Southern Baptist Convention has assigned the Ethics and Religious Liberty Commission the responsibility for addressing a wide range of moral and public policy concerns, including First Amendment issues. The Ethics and Religious Liberty Commission is profoundly concerned about the deleterious effect the lower court's decision will have on the Boy Scouts' First Amendment right to instill traditional moral values in the boys and young men who join Scouting.

Representing the Ethics and Religious Liberty Commission, and appearing on its own behalf as well is the American Center for Law and Justice (ACLJ). The ACLJ is a nonprofit, public interest law firm and educational organization dedicated to protecting First Amendment freedoms, human life and the family. ACLJ attorneys have argued or participated as *amicus curiae* in numerous First Amendment cases before this Court. *See, e.g., Lamb's Chapel v. Center Moriches Union Free School Board*, 508 U.S. 384 (1993); *Westside Community Schools v. Mergens*, 496 U.S. 226 (1990). In this case and in other cases across

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* Counsel of record for the parties in this case have consented to the filing of this brief. Pursuant to Rule 37.6, amici ACLJ and Ethics and Liberty Commission disclose that no counsel for any party in this case authored in whole or in part this brief and that no monetary contribution to the preparation of this brief was received from any person or entity other than *amici curiae*.

the nation, the ACLJ opposes the misuse of state anti-discrimination laws to compel individuals and organizations to endorse currently fashionable sexual ethics.

STATEMENT OF THE CASE

Amici adopt the statement of the case set forth in Petitioners' Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

A. The Lower Court's Decision Conflicts With Foundational Principles Established in This Court's First Amendment Jurisprudence.

The salient feature of the lower court's decision is the insouciance with which it cast aside or otherwise ignored foundational First Amendment principles. The lower court ordered Boy Scouts to believe that a man's sexual morality is irrelevant to the question of his suitability as a leader in Boy Scouts. In holding that Boy Scouts must accept homosexual advocates as role models for young boys, the lower court both circumvented and ignored several of this Court's controlling free speech and expressive association cases.

This Court long has recognized the interdependence of the First Amendment right of free thought and speech with the right to associate with others who share similar views. Those rights necessarily include the right to hold and express views different from what others might consider culturally orthodox:

> Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments.

. . .

> At the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and conscience rather than coerced by the State. . . . *"If there is any fixed star in our constitutional constellation it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act therein."*

Abood v. Detroit Bd. of Educ., 431 U.S. 209, 233-35 (1977) (emphasis added) (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). The lower court did precisely what *Abood* and *Barnette* forbid. In dictating that Boy Scouts must subscribe to the currently fashionable view that sexual morality is irrelevant to a person's character, it "prescribed what shall be orthodox in politics and . . . matters of opinion."

B. The Decision Below Conflicts With This Court's Decision in *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston, Inc.*

A State's public accommodation law cannot be used to compel Boy Scouts to accept that an avowed homosexual is an appropriate role model for young boys. In *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), this Court unanimously held that Massachusetts' anti-discrimination law could not be applied to force the organizers of a St. Patrick's Day parade to allow a gay, lesbian, and bisexual group ("GLIB") to march. GLIB wanted to march in the parade to celebrate its members' heritage as Irish gays, lesbians, and bisexuals. *Id.* at 570.

Even though the parade organizers had no specific articulable message, this Court held that requiring them to include GLIB forced them to convey a message about the acceptability of homosexuality that they did not wish to convey. *Id.* at 572-73. Massachusetts' attempted use of its public accommodation law to coerce a private organization into endorsing GLIB

> violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message. . . . [T]his general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion or endorsement, but equally to statements of fact the speaker would rather avoid.

. . .

> While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.

Id. at 578-79 (emphasis added).

Hurley controls this case. Boy Scouts is an expressive association that exists to foster the moral development of young males. Its "protected expression… take[s] the form of quiet persuasion, including the inculcation of traditional values in the young." *Roberts v. United States Jaycees*, 468 U.S. at 636 & n.* (O'Connor, J., concurring) (citing Boy Scouts as an example of an expressive organization); *see also Curran v. Mount Diablo Council of Boy Scouts*, 952 P.2d 218, 236 (Cal. 1998) (the primary function of Boy

Scouts is the inculcation of traditional moral values); *id.* at 253 (J., Kennard, concurring) (because Boy Scouts is an organization whose activities are "overwhelmingly expressive" under *Hurley,* applying California's anti-discrimination law to Boy Scouts would violate their First Amendment rights.); *Welsh v. Boy Scouts,* 993 F.2d 1267, 1274 (7th Cir.), *cert. denied,* 510 U.S. 1012 (1993) (Boy Scouts' purpose is to train young boys to respect God, their country and their fellow man, while developing a good moral character).

To avoid *Hurley*, the lower court trivialized the critical fact that Boy Scouts' expressive activity consists largely of adult men acting as role models for boys. *See Dale v. Boy Scouts of America,* 734 A.2d 1196, 1229 (N.J. 1999). The 1972 Scoutmasters' Handbook highlights the Scoutmaster's duty to be a good role model:

> You are providing a good example of what a man should be like. What you do and what you are may be worth a thousand lectures and sermons. . . . *What you are speaks louder than what you say. This ranges from simple things like wearing the uniform to the matter of your behavior as an individual. Boys need a model to copy and you might be the only good example they know.*

(emphasis added). Pet. A. 2652. Thus, who a man is is even more important than what he says. Boy Scouts' official policy is that homosexuality is not morally "straight" or "clean." Pet. A. 3241-3247, 3238-3247. Men who by word or deed condone homosexuality cannot, therefore, be good role models.

Dale's views on homosexuality are clearly at odds with those of Boy Scouts. Dale has stated openly that

homosexual conduct is acceptable. Dale expressly declared that he wants to "correct" Boy Scouts' policy against appointing avowed homosexuals to leadership positions in Boy Scouts: "I owe it to the organization to point out to them how bad and how wrong this policy is. . . . Being proud of who I am is something the Boy Scouts taught me. They taught me to stand up for what I believe in." Pet. A. 3366-3367, 3548. Dale does not share Boy Scouts' views on the proper male sexual identity.

The lower court expressed the hope that Dale will "refer boys to their parents on matters of religion and sex." 734 A.2d at 1229. While Dale may well do so, that does not change the fact that Dale is an advocate for homosexual rights. According to the Scoutmasters' Handbook, Dale's identity as a homosexual advocate is more significant than what he says to individual boys. While Dale certainly has the right to be a homosexual advocate, the Boys Scouts has an equivalent right not to hold Dale out as an example for male youth.

In the same vein, the lower court held that because Boy Scouts does not teach specific sexual ethics to its members, it cannot exclude from leadership a man whose sexual morality it disapproves. 734 A.2d at 1224-25. The court's holding is inconsistent with *Hurley*. That Boy Scouts' message is communicated primarily through role modeling, and that it does not *focus* on the subject of homosexuality, makes it no less worthy of First Amendment protection than the parade in *Hurley*. The parade organizers in *Hurley* had no previously articulated views on homosexuality. Moreover, they had no written rules about who could participate in the parade, and they made ad hoc determinations about group participation. Observing the lack of any coherent message in the parade, this Court nonetheless held that the parade

organizers' could not be forced to endorse GLIB's message by allowing them to march: "A narrow, succinctly articulable message is not a condition of constitutional protection." *Hurley*, 515 U.S. at 569. In contrast to the parade organizers in *Hurley*, Boy Scouts has a coherent message, and Boy Scouts' views on homosexuality have been articulated clearly. Pet. A. 3241-3247. Accordingly, stripping Boy Scouts of autonomy over the content of its message by foisting Dale on it as a leader is an even more egregious infringement of its First Amendment rights.

In ignoring the essential part that role modeling plays in communicating Boy Scouts' message, the lower court's decision also conflicts with this Court's historically broad definition of symbolic speech. Expressive conduct is entitled to First Amendment protection if the activity is intended to convey a message likely to be understood by a particular audience. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 404 (1989) (burning of American flag is protected speech); *see also Roberts v. United States Jaycees*, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring) ("even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and desire for self-improvement"). It is undisputed that the Scout Oath, the Scout Law, and all Scouting activities are designed to convey a message about what is ideal manhood, including an ideal man's sexual identity (heterosexual husband and father). Pet. A. 2531-2532, 4395. Scouting's values are to be exemplified in its adult volunteer leaders. Because Scouting's message is much more articulate than the parade's message in *Hurley* and, therefore, much more likely to be understood, Scouting's message is that much more entitled to protection.

C. The Decision Below Is Inconsistent With This Court's Decisions Defining the First Amendment Right of Expressive Association.

The lower court either distorted or ignored most of this Court's jurisprudence defining a private organization's First Amendment right to expressive association. First, the court ignored this Court's decisions in *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 233 (1988) and *Democratic Party v. Wisconsin*, 450 U.S. 107, 122 (1981) which held that in the context of group expression, an association's ability to select the content of its message is inextricably woven with its freedom to select its leaders and members.

In *Democratic Party v. Wisconsin*, 450 U.S. 107, 122 (1981), this Court held that forcing the national Democratic party to alter its delegate selection criteria would violate the party's First Amendment right to expressive association. Specifically, the Court stated that freedom to associate to promote shared values includes "freedom to identify the people who constitute the association, and to limit the association to those people only. . . . 'Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.'" *Id.* at 122 & n.22 (quoting L. Tribe, *American Constitutional Law* 791 (1st ed. 1978)).

More significantly, this Court warned lower courts against exactly the sort of presumption the lower court exercised in this case. Rejecting the argument that the national Democratic Party delegate selection procedures were ineffective or unnecessary to the goal of achieving ideological purity, the Court stated:

> [A] State, or a court, may not constitutionally substitute its own judgment for that of the Party. A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution. *And as is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational.*

450 U.S. at 123 (emphasis added).

Similarly, in *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 233 (1988), this Court held that an expressive organization's freedom to select its leaders is essential to the exercise of its First Amendment free speech and associational rights. There, a California law imposed several restrictions on the identity and selection process of local party chairmen and committee members. *Id.* at 218. This Court struck down the restrictions as unconstitutionally infringing of the local parties' expressive associational rights. *Id.* at 229. Rejecting California's assertion of a compelling interest in the "integrity" of internal party affairs, the Court held that "a state cannot substitute its judgment for that of the party as to the desirability of a particular internal party structure, any more than it can tell a party that its proposed communication to party members is unwise." *Id.* at 233. Again in that case, the Court chided the lower court for "impos[ing] its views about membership and leadership criteria" on the local Democratic Party. *Id.* at 233; *see also Hsu v. Roslyn Union Free School Dist.*, 85 F.3d 839, 857-59 (2d Cir. 1996) (holding that a school club's free speech and expressive associational rights were violated when the school enforced

its anti-discrimination rule against the club in the selection of its leaders.)

Both *Eu* and *Democratic Party* contradict the lower court's holding that Boy Scouts can only exclude from its leadership those who oppose Boy Scouts' mission. Those two cases establish that it is not the business of the judiciary to second-guess an expressive organization's leadership and membership criteria. The lower court violated the dictates of *Eu* and *Democratic Party* by improperly substituting its own interpretation of Boy Scouts' views and policies. Specifically, the court declared by ipse dixit that Boy Scouts' position on homosexuality is: 1) inconsistent with other Scouting values; 2) disingenuously taken up in response to litigation; and 3) insignificant because it is not "central" to Scouting's mission. *See* 734 A.2d at 1223-25.

In similar fashion, the lower court ignored this Court's expressive association analysis in *Hurley*. The lower court's ruling that Boy Scouts could not exclude avowed homosexuals from its leadership because Boy Scouts was not formed specifically to oppose homosexuality flatly contradicts *Hurley*. Even though the parade in *Hurley* was not organized to oppose homosexuality, this Court said that GLIB "could be refused admission [to the parade] just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." *See* 515 U.S. at 581.[1]

The lower court also distorted this Court's decisions in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Board of Directors of Rotary International v. Rotary Club*,

[1] Although the Court's free speech analysis determined the outcome in that case, the unanimous opinion made clear that the same result would obtain under an expressive association analysis. *See* 515 U.S. at 581.

481 U.S. 537 (1987); *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988) (collectively, the *Roberts* trilogy). The lower court relied on the *Roberts* trilogy, as it relied on *Hurley*, to support its holding that the Boy Scouts' right of expressive association was not violated because Boy Scouts was not formed to oppose homosexuality. The lower court twisted language from those cases into the proposition that an expressive association can only exclude from its leadership those whose views differ on key matters, as that term is defined by the reviewing court. 734 A.2d at 1224-25.

In *Roberts* and *Rotary Club*, the Jaycees and the Rotary Club invited women to participate on some level, but excluded them from full membership privileges. In both cases, this Court recognized the organization's expressive associational rights but held that the state's compelling interest in eradicating sex discrimination outweighed the minimal burden placed on those rights. 468 U.S. at 623; 481 U.S. at 549. *Cf. New York State Club Ass'n*, 487 U.S. at 13 (affirming constitutionality of New York City's anti-discrimination ordinance against facial challenge). In the *Roberts* trilogy, this Court also held that a limitation on an expressive association's right to select its members according to its own criteria must be unrelated to the expression of ideas. *See, e.g.*, *Roberts*, 468 U.S. at 623. Because the private associations at issue admitted women as members but denied them full privileges, this Court held that applying the anti-discrimination law "impose[d] no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members." *Roberts*, 468 U.S. at 627; *Rotary Club*, 481 U.S. at 548 (application of law did "not require the clubs to abandon or alter" any of their views); *see also New York State Club Association*, 487 U.S. at 13 (law did not prevent a "club from seek[ing] to exclude individuals

who do not share the views that the club's members wish to promote.").

This case is a prototype of the sort of case anticipated in the *Roberts* trilogy. New Jersey may not violate the Boy Scouts' First Amendment rights of free speech and expressive association unless a compelling state interest so requires, *and* application of the law in question is unrelated to the expression of ideas. *See Roberts*, 468 U.S. at 623. Whatever ambiguity existed in the *Roberts* trilogy about the extent to which a private association can exclude persons with different ideologies was eliminated in *Hurley*. The ideology upon which exclusion is based need not be central to the group's mission. Indeed, it need not be about any subject the group has even ever addressed before. 515 U.S. at 581. Here, the Boy Scouts' exclusion of Dale is based purely on ideological grounds, and it is therefore absolutely protected under the First Amendment.

The lower court's reading of the *Roberts* trilogy would virtually emasculate the right of expressive association. Reserving the freedom to exclude based on ideology only to those groups that are formed for the primary purpose of discriminating against a certain class of persons means that few associations would be protected. The lower court's reading of *Roberts* also leads to the rather perverse result that only groups' whose raison d'etre is discrimination would have expressive associational rights. Nothing in the *Roberts* trilogy supports such a confined view of the right to expressive association.

In essence, the lower court's objective in enforcing the LAD against the Boy Scouts is nothing short of an attempt to "free" the Boy Scouts of its "biases" and change its expressive conduct so that "it is at least neutral toward"

homosexuals. *See Hurley*, 515 U.S. at 579. As this Court said in *Hurley*, the First Amendment renders this a "decidedly fatal objective." *Id.*

D. The Lower Court's Decision that Protecting Homosexuals Is A Compelling State Interest Which Trumps Boy Scouts' First Amendment Rights Conflicts With This Court's Decisions.

The lower court's holding that protecting homosexuals from discrimination is a compelling state interest which trumps Boy Scouts' First Amendment rights conflicts with *Hurley*. In response to the same assertion, this Court held that eliminating discrimination against homosexuals can never trump the First Amendment right of speaker autonomy:

> [No] legitimate interest has been identified in support of applying the Massachusetts statute in this way to expressive activity like the parade.
>
> . . .
>
> On its face, the object of the law is to ensure by statute for gays and lesbians desiring to make use of public accommodations what the old common law promised to any member of the public wanting a meal at the inn, that accepting the usual terms of service, they will not be turned away merely on the proprietor's exercise of personal preference. *When the law is applied to expressive activity the way it was here, its apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own. But in the absence of some further legitimate end, this object is merely to allow exactly what the general rule of speaker's autonomy forbids.*

515 U.S. at 578 (emphasis added). Thus, Boy Scouts' right of speaker autonomy is supreme over any interest New Jersey has in protecting homosexuals from discrimination.

The lower court's decree that protecting homosexuals from discrimination is a compelling state interest also disregards this Court's multiple pronouncements about the rigor of strict scrutiny. "First Amendment rights are entitled to special constitutional solicitude," and the Supreme Court has "required the most exacting scrutiny" in cases where state action burdens free speech. *Widmar v. Vincent*, 454 U.S. 263, 276 (1981). Strict scrutiny is not "watered . . . down but really means what it says." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 545 (1992) (quotations omitted).

In his dissenting opinion from the denial of a writ of certiorari in *Swanner v. Equal Rights Commission*, 513 U.S. 979 (1994), Justice Thomas warned against a modern trend toward "drain[ing] the word compelling of any meaning." In a case involving a landlord's refusal to rent to an unmarried couple, Justice Thomas cited the myriad ways that state insurance and succession laws discriminate on the basis of marital status, and observed that if the state's interest against marital status discrimination is compelling, it is difficult to imagine a governmental interest that is not compelling. *Id.* at 982 (Thomas, J., dissenting). New Jersey criminalized homosexual conduct until 1979. In *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), this Court upheld the constitutionality of a state's sodomy law because the state's legitimate moral objection to homosexual conduct provided a rational basis for the law. If homosexual conduct which was, until

recently, a crime in New Jersey, and which states still may constitutionally criminalize, can be a compelling state interest, then the word 'compelling' certainly is drained of all meaning.

If Dale and others wish to form alternative Scouting organizations where homosexuality is permitted or even extolled, they are free to do so. Moreover, the First Amendment guarantees their right to speak out against Boy Scouts' policies. The First Amendment prevents them, however, from remaking Boy Scouts into their concept of a proper Scouting association. Requiring Boy Scouts to accept Dale as an assistant Scoutmaster is nothing less than an effort to silence Boy Scouts' views and message on homosexuality. As such, it is a severe intrusion on Boy Scouts' First Amendment rights of free speech and expressive association.

II. THE PETITION PRESENTS AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW THAT THIS COURT SHOULD RESOLVE.

Granting this petition is necessary to avert the possibility that federal and state courts will adopt conflicting decisions concerning the free speech and expressive associational rights of private youth service organizations like Boy Scouts. Several other appellate courts have already decided cases concerning the applicability of public accommodation statutes to Boy Scouts. *See Welsh v. Boy Scouts*, 993 F.2d 1267, 1274 (7th Cir.), *cert. denied*, 510 U.S. 1012 (1993) (holding that Boy Scouts was not a public accommodation under Title II of the federal Civil Rights Act of 1964); *Curran v. Mount Diablo Council of Boy Scouts*, 952 P.2d 218 (Cal. 1998) (holding that Boy Scouts was not a business establishment under California's Unruh Act); *Seabourn v.*

Coronado Area Council of Boy Scouts, 891 P.2d 385 (Kan. 1995) (holding that Boy Scouts was not a Public Accommodation under Kansas' Act Against Discrimination); *Quinnipiac Council, Boy Scouts of America, Inc. v. Commission on Human Rights and Opportunities*, 528 A.2d 352 (Conn. 1987) (holding that Connecticut's anti-discrimination statute applied to Boy Scouts but did not preclude them from refusing to allow a female to become a Scoutmaster.)

In *Curran v. Mount Diablo Council of Boy Scouts*, 29 Cal. Rptr. 2d 580, 595 (Ct. App. 1994), the California Court of Appeals held that applying California's Unruh Act would violate Boy Scouts' First Amendment free speech and expressive associational rights. The California Supreme Court affirmed, however, on the basis that the Act did not cover Boy Scouts because Boy Scouts was not a business establishment. *See* 952 P.2d at 219. Although the New Jersey Supreme Court is the first appellate court to hold that a state public accommodation statute applies to the Boy Scouts and compels them to accept avowed homosexuals as leaders, the First Amendment issue raised in this case is likely to arise in the future and occasion conflicting decisions among federal and state courts. To avoid potential confusion, this Court's direction is needed and the petition should be granted.

If the lower court's decision stands, it is only a matter of time before Boy Scouts' position on homosexuality is completely compromised. Dale's victory would open the door to other advocates of homosexuality requesting appointment as Scoutmasters. Just days after the decision below was issued, a circuit judge from Cook County Illinois held that Boy Scouts could not refuse to hire a homosexual in the Chicago Area Boy Scouts Council office. The circuit

judge's order was stayed pending an appeal to the Illinois Appellate Court. See Tom Ragan, *Gay Wins Court Ruling Against Scouts,* Chi. Trib., August 14, 1999, at 5 and Tom Ragan, *Scouts' Policy Not to Hire Gays Stands, For Now,* Chi. Trib., September 9, 1999, at 4. In *Curran v. Mount Diablo Council of Boy Scouts*, 952 P.2d 218 (Cal. 1998), a homosexual advocate also sought a Boy Scouts leadership position as a forum for proclaiming his views on homosexuality. Accepting homosexual advocates as Scoutmasters and assistant Scoutmasters and holding them out as approved role models for young boys would certainly alter Boy Scouts' message that homosexuality is not morally "straight" or "clean."

CONCLUSION

The decision below directly conflicts with this Court's jurisprudence governing freedom of speech and the right to expressive association. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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